No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1956

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION; AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan is reported at 132 F. Supp. 899. (Joint App. 112–122.)[1] The opinion of the Court of Appeals is reported at 234 F. 2d 380. (Pet. App. B.)

[1] A separate certified transcript of the record was not filed with the petition for writ of certiorari by the petitioners. However, the certified record was filed by the petitioners on September 10, 1956, together with a jurisdictional statement in No. 401, October Term, 1956. Accordingly, references will be made to the Joint Appendix which forms a part of that record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1956. (Pet. 9a.) On September 10, 1956, petitioners, having filed an appeal (No. 401), submitted a jurisdictional statement urging this Court to note probable jurisdiction. The United States, on October 5, 1956, filed a motion to dismiss or affirm. An order of Mr. Justice Reed was entered on September 15, 1956, extending the time for filing a petition for writ of certiorari to and including November 13, 1956. The petition for a writ of certiorari was filed on November 13, 1956. The jurisdiction of this Court to grant the petition for a writ of certiorari is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the contracting officers of the United States had authority to enter into contracts which provide for the vesting of title to parts, materials, etc., in the United States upon the making of a partial payment.

2. Whether the United States had acquired ownership of the property or whether it had acquired title as a pure security arrangement.

3. Whether a state or local *ad valorem* property tax on the property of the United States avoids constitutional invalidity where the tax is assessed to the government contractor rather than directly to the United States.

STATEMENT

The pertinent facts may be briefly summarized as follows:

On March 23, 1951, the Murray Corporation of America entered into a letter sub-contract (Joint App. 169–172) with the Kaiser-Frazer Corporation for manufacture of certain of the parts and sub-assemblies which were required under Kaiser's prime contract (Joint App. 144–168) with the United States for the manufacture of airplane parts, tools and sub-assemblies for the use of the United States Air Force. The Murray letter sub-contract, which was in effect on January 1, 1952, provided for the vesting of title to parts, materials, etc., upon the making of partial payments in the following terms (Joint App. 174–175):

> 11. *Partial payments.*—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions:
>
> * * * * *
>
> (b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this con-

> tract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: * * * .

In addition to the sub-contract which the Murray Corporation had with Kaiser, it also had on January 1, 1952, a letter sub-contract (Joint App. 216–221), similar in nature and terms, with Wright Aeronautical Corporation (later Curtis-Wright) which latter corporation held a prime contract (Joint App. 189–215) with the United States, similar to the prime contract of Kaiser.

From August 10, 1951, to December 20, 1951, the Murray Corporation made requests on appropriate Air Force forms for partial (or progress) payments under its Kaiser sub-contract. (Joint App. 47–48.) Following audit of these requests by the Air Force and approval by the contracting officer (Joint App. 48), the Murray Corporation received thereon, prior to January 1, 1952, partial payments in the sum of $163,949.20 (Joint App. 51).

On October 30, 1951, and December 4, 1951, the Murray Corporation made requests for partial (or progress) payments under its Wright sub-contract. (Joint App. 49.) Following audit of these requests by the Air Force and approval by the contracting officer (Joint App. 49), the Murray Corporation received thereon, prior to January 1, 1952, partial payments in the sum of $510,827.67 (Joint App. 51).

Included in the personal property assessed to the Murray Corporation by the petitioners on January 1, 1952, were parts, materials, etc., which had been acquired or produced by the Murray Corporation for

the performance of its sub-contracts. It is this property which is the subject of the disputed assessments here. On, prior and subsequent to January 1, 1952, such assessed property was clearly identified as property owned and belonging to the United States Government by tagging, labeling or by segregation from other personal property owned and belonging to the Murray Corporation in connection with the conduct of its regular business. Upon their acquisition or production by the Murray Corporation, individual tools, parts and sub-assemblies were tagged, stamped or labeled as property owned and belonging to the United States Government by serial numbers which identified them as such. Those tools, parts or sub-assemblies which were too small to permit such tagging, stamping, or labeling were segregated both in storage and in use from personal property owned and belonging to the Murray Corporation. The same procedures were followed as to materials and supplies acquired by the Murray Corporation for the performance of the sub-contracts. The aircraft operations of the Murray Corporation were entirely separated from its other operations, being conducted either in completely separate buildings, on separate floors, or in definitely divided sections of a floor. (Joint App. 56–57, 97.)

The Murray Corporation paid, under protest, the sum of $67,714.96 to the City of Detroit and the sum of $12,572.66 to the County of Wayne on account of the assessments of 1952 personal property taxes based upon the parts, materials, etc., acquired or produced

for performance of the sub-contracts. (Joint App. 122–123.)

Thereafter, the Murray Corporation brought three actions in the United States District Court to recover *ad valorem* personal property taxes so assessed and paid. The United States of America was permitted to intervene upon its claim of ownership to the personal property upon which the assessments were made. (Joint App. 112.)

The District Court entered judgments in favor of the Murray Corporation (Joint App. 124–126) upon its written opinion (Joint App. 112–122). Thereafter the three actions were consolidated for appeal. (Joint App. 135–136.) On appeal the judgments of the District Court were affirmed. (Pet. 9a.)

ARGUMENT

The decision below, holding that local property taxes could not be imposed on property of the United States, represents a correct application of principles which are firmly rooted in the decisions of this Court and does not raise issues warranting further review.[2]

1. The decision of the Court of Appeals is not in conflict with that of this Court, of any other Court of Appeals or the highest court of any state, nor do petitioners so contend. Nor did the Court of Appeals decide a state question in a way to conflict with applicable State law. In the final analysis, the principal

[2] The grounds for opposing certiorari herein are similar to those advanced by the United States in its motion to dismiss or affirm in No. 301, the appeal taken by petitioners from the same judgments below.

issue here involves the drawing of conclusions from the particular facts to determine whether the personal property assessed was that of the Murray Corporation or that of the United States. If, under the contract, the property was that of the Murray Corporation, the assessment was valid. If, on the other hand, ownership of the property, under the terms of the contract, was in the United States, it necessarily followed that the assessment was invalid. *Mayo* v. *United States*, 319 U. S. 441; *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

This Court has repeatedly held that the construction of a contract through which the United States is exercising its constitutional functions, as here, and the title which it creates present a federal question. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *Carpenter* v. *Shaw*, 280 U. S. 363; *United States* v. *Allegheny County*, *supra*; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*.

Accordingly, neither the applicability of a state law nor a state question is here presented.

2. Both the District Court and the Court of Appeals decided the federal questions involved in full accord with applicable decisions of this Court.

(a) Petitioners unsuccessfully urged below, and urge here (Pet. 3), that the contracting officers of the Government had no authority under Federal law to incorporate the partial payment clauses into the procurement contracts. This Court's decision in *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, affirms the authority of contracting officers to negotiate any type of contract

not specifically prohibited which will promote the best interests of government. Petitioners, asserting that the Government is specifically prohibited by statute from entering into contracts providing for partial payments, rely upon Section 3648, Revised Statutes (31 U. S. C. 1952 ed., Sec. 529). However, that provision prohibits only payments in advance of any performance of services or payments in advance of delivery of articles, title to which is not taken prior to delivery. It does not prohibit the Government from acquiring ownership on the making of partial payments.

As early as 1885, Section 3648 was interpreted by the Attorney General as permitting the making of partial payments, providing title to the property passed to the Government at the time such payments were made. 18 Op. A. G. 105 (1885). See also to the same effect: 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911). The same view consistently has been expressed by the Comptroller General. 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468, 470 (1949). Cf. *United States* v. *Ansonia Brass &c. Co.*, pp. 466–470, *supra*; *Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311; *In Re Read-York*, 152 F. 2d 313 (C. A. 7th).

The Court of Appeals, accordingly, correctly affirmed the trial court's holding that the partial payment clauses were not invalid for want of authority or for non-conformity with the Federal statutes. (Pet. App. B.)

(b) Petitioners unsuccessfully urged below, and urge here (Pet. 4), that the title which vested in the

United States under the partial payment clauses was merely paper or security title. This question was settled in *United States* v. *Ansonia Brass &c. Co.*, pp. 466–470, *supra*. The contract there provided that (p. 466): "The parts paid for under the system of partial payments * * * shall become thereby the sole property of the United States * * *." The contractural provision here provides that (Joint App. 175): "Upon the making of any partial payment * * * title to all parts, materials, inventories, work in process and non-durable fools theretofore acquired or produced * * * shall forthwith vest in the Government * * *". Both provisions express the intention of the parties to the respective contracts that the Government should acquire absolute ownership of the property prior to completion. In both contracts, particular provisions, such as payment of insurance premiums by the contractor and retention by the Government of the right to reject upon completion, were not inconsistent with the vesting of title in the United States and did not detract from the binding force of the distinct contract provisions making the United States the owner.

The Court of Appeals correctly affirmed the trial court's holding that a reading of the contract leaves no doubt that, upon the making of a partial payment, ownership of parts, materials, etc., acquired for the performance of the contract, vested in the Government. (Pet. App. B.)

(c) Once it was determined that the property in question was owned by the United States, the unbroken line of decisions of this Court required the con-

clusion that a local *ad valorem* tax could not be imposed on the property consistent with the constitutional immunity of the United States. Nor did the tax assume constitutional validity merely because it was assessed to the contractor rather than the United States. *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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